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STATE OF NEW HAMPSHIRE

JUN 23 2006

NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

In Re: Canobie Lake No Swim Rule Waiver Request
Env-Ws 386.61(h)(4)

TOWN OF SALEM'S PARTIALLY ASSENTED-TO MOTION TO DISMISS

NOW COMES the Town of Salem, intervening respondent in this matter and moves the Wetlands Council to dismiss this appeal for the following reasons:

1. Petitioners filed a waiver request with the NHDES on November 14, 2005 seeking "relief in its entirety from Env-Ws 386.61(h)(4), 'prohibition against swimming in Canobie Lake' hereafter "NO SWIM RULE." In their waiver request Petitioners contend lake "abutters will benefit from the restoration of littoral rights." Petitioners do not seek to temporarily suspend the rule or limit the rule's application to a particular property for a limited time.¹ Rather, as Petitioners state in their original petition, "either the NO SWIM RULE is a necessary restriction of individuals rights to enjoy their property, or it is not and should be suspended."

2. Env-Ws 386.61(h)(4) states "No person shall bathe or swim in said lake."

3. That rule was adopted by DES in accordance with RSA 485:24 and RSA 541-A.

4. Petitioners waiver request was denied by DES by letter decision dated March 9, 2006 and this appeal followed. It seeks relief for the "Appellant's property and the like."

5. RSA 21-O:7 establishes the Water Council. RSA 21-O:7 IV requires the Water Council to "hear and decide all appeals from *department decisions*."

¹ At the prehearing conference Petitioners identified they were amending their waiver request so it would pertain only to their property and not the lake in general but no official amendment of their request has been received to date.

6. However, “***Department decision***’ shall not mean rulemaking or an agency declaratory ruling as provided for in RSA 541-A...”. RSA 21-0:14 I (emphasis added)

7. Furthermore, the Water Council’s rules on the conduct of adjudicatory proceedings reaffirms that during an adjudicatory hearing the Water Council has no jurisdiction over rulemaking. Env-Wc 201.02(b)(1) specifically provides the chapter shall not apply to “any decision pertaining to rulemaking” because rulemaking decisions are not allowed by law to be appealed to the Council pursuant to RSA 21-O:14 I.

8. A “rule” is defined as “each regulation, standard, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agent, whether members of the general public or personnel in other agencies.” RSA 541-A:1, XV. “Rules are valid only if adopted in accordance with the procedures prescribed by RSA Chapter 541-A.” Appeal of City of Manchester, 149 N.H. 283, 288 (2003) (citation omitted).

9. “The law requires that an administrative agency must follow its own rules and regulations, ... and an agency may not undertake ad hoc rule-making...”, Appeal of Nolan, 134 N.H. 723, 728 (1991) (citation omitted).

10. Petitioners waiver request here amounts to rulemaking insofar as it seeks to rewrite the rules for Canobie Lake by striking the provisions in Env-Ws 386.61(h)(4) which currently prohibit swimming or bathing in Canobie Lake. The petition should therefore be dismissed.

11. The requested waiver here is not a request for a waiver in the application of rule to a particular property for a limited period of time. It is a request to rewrite a rule in its entirety by removing it. As such, this appeal is a request for the Water Council to overturn a decision

DES made under RSA 485:24, the Water Council made under RSA 21-O:7 V, and the legislature made under RSA 541-A:2 to approve the No Swim Rule for Canobie Lake in the first place.

12. To the extent Petitioners seek to rewrite Env-Ws 386-61(h)(4) as it applies to Canobie Lake in general and not specifically to their property in a limited way, and also because their need for a waiver is not somehow different then the need of other similarly situated abutters, this appeal should be dismissed.

13. Petitioners are improperly using an adjudicatory process in an effort to overturn a governmental decision that went through the process of rulemaking and bans swimming and bathing in Canobie Lake.

14. Petitioners proper remedy is to seek a rulemaking change not a waiver of the rule and as a result this appeal should be dismissed for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction.

15. The State of New Hampshire has assented to this Motion to Dismiss. As a dispositive motion the Town has not sought the assent of the Petitioners.

WHEREFORE, the Town of Salem respectfully requests that the Presiding Officer:

- (a) Grants this Motion To Dismiss; and
- (b) For such other and further relief as may be just.

Respectfully submitted this 22nd day of June, 2006.

TOWN OF SALEM

By Its Attorneys

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CERTIFICATE OF SERVICE

I, Gordon B. Graham hereby certify that a copy of the foregoing Partially Assented-to Motion to Dismiss was this day mailed first class, postage prepaid to: Esther Piszczek, Office of the Attorney General, 33 Capitol Street, Concord, NH 03302, Stephen M. Andrews, 48 Woodvue Road, Windham, NH 03087 and John Carpenter, 44 Woodvue Road, Windham, NH 03087.

By: _____

Gordon B. Graham

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